

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE:

B-171152

MATTER OF:

DATE:

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Payment in lieu of cost-of-living allowance to
employees whose pay is administratively fixed.

DIGEST:

Amount in lieu of the cost-of-living allowance may be paid to employees in Alaska of the Federal Railroad Administration, Department of Transportation, whose pay is fixed administratively, since the statutory provisions limiting such salaries to amounts not in excess of salaries of specified grades under the General Schedule refer to basic compensation rates in subchapter I, chapter 53, title 5, United States Code, not to allowances in chapter 59, title 5, United States Code.

This decision is in response to a letter from the Assistant Secretary for Administration, Department of Transportation, requesting our opinion as to whether employees whose pay is set administratively rather than by statute may be paid an amount representing an allowance for higher costs of living in Alaska without regard to the statutory provisions limiting basic pay under the General Schedule to that specified for level V of the Executive Schedule.

The situation giving rise to the inquiry was summarized as follows in the Assistant Secretary's letter of June 16, 1975:

"The compensation for the seven employees in question (the general manager, assistant general manager and five other officers of the Alaska Railroad, all stationed in Alaska) is set administratively by DOT under the authority of 43 U.S.C. 975, Executive Order 11107 and section 6(i) of the Department of Transportation Act, P.L. 89-670, 49 U.S.C. 1655(i). The Secretary of Transportation has delegated the authority to operate and administer the Alaska Railroad to the Administrator, FRA. Annual appropriations acts for FRA/DOT prescribe certain limitations on the salaries of these employees. For example, P.L. 93-391, making appropriations for DOT for fiscal year 1975, states that:

'no employee [of the Alaska Railroad] shall be paid an annual salary out of said fund in excess of the salaries prescribed by the Classification Act of 1949, as amended, for GS-15, except the

PUBLISHED DECISION
55 Comp. Gen.

general manager of said railroad, one assistant general manager at not to exceed the salaries prescribed by said Act for GS-17, and five officers at not to exceed the salaries prescribed by said Act for grade GS-16.'

"Identical language is found in appropriations acts for the fiscal years preceding 1975. In addition, 5 U.S.C. 5363 provides that:

'the head of an Executive agency or military department who is authorized to fix by administrative action the annual rate of basic pay for a position or employee may not fix the rate at more than the maximum rate for GS-18.'

"Federal employees stationed in Alaska whose basic salaries are paid under the General Schedule may be paid a cost of living allowance (hereafter "COLA") pursuant to 5 U.S.C. 5941. That section provides as follows:

'(a) Appropriations or funds available to an Executive agency, except a Government controlled corporation, for pay of employees stationed outside the continental United States or in Alaska whose rates of basic pay are fixed by statute, are available for allowances for these employees. The allowance is based on --

"(1) living costs substantially higher than in the District of Columbia;

"(2) conditions of environment which differ substantially from conditions of environment in the continental United States and warrant an allowance as a recruitment incentive; or

"(3) both of these factors.

The allowance may not exceed 25 percent of the rate of basic pay.' * * * "

Since the cost-of-living allowance by the statutory definition above applies only to employees whose pay is fixed by statute, the seven employees of the Alaska Railroad whose pay is set administratively are ineligible for the allowance, thereby placing them in a less advantageous situation than similarly situated employees paid under the General Schedule. However, two of our decisions have permitted the practice of according "like benefits to the two classes of employees." B-94742,

May 8, 1950; 40 Comp. Gen. 628 (1961). The 1950 decision stated, in part, that--

" * * * no objection is perceived to the administrative prescribing of 'additional compensation' for such employees on account of services performed outside the continental United States or in Alaska by adoption of such regulations as would be similar to those contained in Executive Order No. 10,000, the adoption of which plan would accord like benefits to the two classes of employees * * *."

After a careful study of the applicable statutes, the 1961 decision concluded that Congress did not intend to treat employees not subject to the Classification Act less favorably than those subject thereto.

In 31 Comp. Gen. 466 (1952), we held that the payment of a cost-of-living allowance in Hawaii should be considered "additional compensation" and, therefore, had to be considered in computing the aggregate compensation limitation that could be paid to the employees in question under the Judiciary Appropriation Act of 1952, as amended. Although that case is similar to the present one, it is distinguishable in that the positions there involved were funded under the Judiciary Appropriation Act. That act is couched in terms of aggregate salary limitations; that is, the total salaries of all employees of a judge may not exceed the aggregate salary limitation contained in the annual appropriation act where there is a cost-of-living allowance paid in addition to basic salaries. If aggregate salaries were sufficiently low, or if fewer employees were hired, then a cost-of-living allowance could be paid to the extent that the aggregate amount paid did not exceed the appropriation limitation. Since in the present case there is no such aggregate salary limitation, the holding of the 1952 decision is inapplicable.

Our interpretation of the proviso in Public Law 93-391 limiting the annual salary of employees of the Alaska Railroad to salaries prescribed by the Classification Act of 1949, as amended, is that it applies only to the basic rate of pay under the Classification Act and does not forbid additional allowances for the cost of living. Such an interpretation puts the two classes of employees on a more equal footing. In our 1961 decision this conclusion was held to be preferable since it was reasonable to presume Congress did not intend to place one class of employees in an inferior position to the other.

On January 8, 1971, section 3(a) of Public Law 91-656 added 5 U.S.C. § 5308 which provides that "/E/ay may not be paid, by reason of any provision of this subchapter, at a rate in excess of the rate

B-171152

of basic pay for level V of the Executive Schedule." Emphasis added. The enactment of section 5308 lends further support to our earlier conclusion that Congress did not intend to differentiate between employees paid under the General Schedule and those paid under administrative orders. Section 5308 applies only to "pay" under "any provision of this subchapter" (Pay Comparability System) and not to other payments authorized elsewhere. The language of this section precludes periodic increases in the amount of basic pay for General Schedule and administratively fixed salaries (whose maximum amounts may not exceed the amounts under the Pay Comparability System subchapter) when such increases would raise the employee's annual salary, exclusive of other payments such as a cost-of-living allowance, above the basic pay for level V of the Executive Schedule. Since the cost-of-living allowance is not authorized in the Pay Comparability System subchapter, but by chapter 59, it is not basic pay and 5 U.S.C. § 5308 is not applicable to it or to a sum in lieu thereof.

In view of the above, the Administrator, FRA/DOT, may properly pay amounts representing the cost-of-living allowance in Alaska to employees whose pay is fixed administratively. Of course such amounts should not be in excess of the cost-of-living allowance that would be paid to employees in comparable grades under the General Schedule.

R.F.KELLER

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 of the United States